91-204

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARRIS COUNTY, TEXAS,
Petitioner

v.

HARRY WALSWEER,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

I. The state court of appeals designation of a precinct constable as a county policymaker violates 42 U.S.C. § 1983's proscription against vicarious liability and conflicts with the decisions of the Fifth Circuit and other Circuits.

II. The appellate court's adoption of the "final decision making authority" test as the sine qua non of policy-making raises important and recurring questions on the application of 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were the Petitioner Harris County, Texas, Respondent Harry Walsweer; Ed "Tracy" Maxon Constable of Precinct 5, deputies Tim Martin, Brian Black, Corey Burkhalter, and John Schlein were parties in "their official capacities". Texas Association of Counties, and County Judges and Commissioners Association of Texas, filed amicus briefs.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

The petitioner, Harris County, a political subdivision of the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Eleventh Judicial District of Texas, entered in *Harry Walsweer v. Harris County, Texas,* 11-89-182-CV, on August 23, 1990.

OPINION BELOW

The opinion of the state court of appeals is reported at 796 S.W.2d 269, and is reprinted in the appendix hereto at p. 1a, *infra.*

The decision of the Texas Supreme Court to deny writ of error is reprinted in the appendix hereto at p. 20a, *infra*. The decision of the Texas Supreme Court denying the motion for rehearing is reprinted in the appendix hereto at p. 22a, *infra*.

JURISDICTION

Respondent Harry Walsweer brought suit in state court under 42 U.S.C. § 1983 against Harris County, Constable Maxon, and four deputy constables. See appendix at p. 1a., *infra*. On or about March 3rd, 1988, the trial court granted Harris County's motion for instructed verdict, adopting the conclusion reached by *Rhode v. Denson,* 776 F.2d 107 (5th Cir. 1985), *cert. denied,* 476 U.S. 1170 (1986), that a precinct official, such as the constable, did not occupy a policymaking position in a Texas county. Respondent appealed the decision of the trial court. On August 23, 1990, the court of appeals reversed the instructed verdict granted to Harris County and remanded the cause to the trial court. Petitioner Harris County appealed the decision to the Texas Supreme Court. On April 3, 1991, the Texas Supreme Court denied Petitioner's writ of error with the notation "writ denied". On May 1, 1991, the Texas Supreme Court denied Harris County's Motion for Rehearing. This petition for certiorari has been filed within ninety days of the denial of Petitioner's motion for rehearing. Jurisdiction of this Court to review the judgment of the Eleventh Court of Appeals is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

42 U.S.C. § 1983, reproduced in the appendix at p. 23a., *infra*.

STATEMENT OF THE CASE

On September 14, 1984, members of Respondent's family requested police assistance in response to seeing a man in the yard with a gun. Deputies Martin, Black, Burkhalter and Schlein, employed by Tracy Maxon, constable of Precinct 5, responded to this call.[1] What followed is a matter of considerable dispute, however shots were exchanged and Respondent sustained injuries. Respondent filed a 42 U.S.C. § 1983 lawsuit against Harris County, constable Maxon, and the four deputies, alleging that his injuries were attributable to constable Maxon's inadequate training policy. At the close of all the evidence the trial court granted Harris County's motion for instructed verdict relying on the Fifth Circuit's decision in *Rhode v. Denson,* that a precinct official, such as the constable, did not occupy a policymaking position so as to impose § 1983 liability upon a county. The case was submitted to the jury on the liability of the remaining defendants and the jury returned a verdict in favor of the Respondent. Subsequently, the trial court proceeded to enter judgment against constable Maxon and the four deputies in their "official capacities".[2]

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1. Harris County is divided into eight constable precincts. See p. 24a, *infra.*

2. The appellate court cited the wording of the judgment in support of its decision to reverse the instructed verdict granted to Harris County. The trial court entered judgment against the constable and his four deputies "in their official capacities" after, the trial court had granted Harris County's motion for instructed verdict. Similarly, the appellate court relied on the jury's response to Question No. 6,

"Do you find that such incompetence or misbehavior was known by Harris County?"

Answer: "Yes."

to reverse the instructed verdict. Since Harris County had received

Respondent appealed the trial court's decision contending that the instructed verdict was improperly granted because constable Maxon's policymaking status was a disputed fact issue. Multiple briefs were submitted by both parties and on August 23, 1990, the appellate court rendered its decision. The appellate court erroneously found the Fifth Circuit's opinion in *Rhode v. Denson* "factually distinguishable". See opinion below, at p. 11a *infra*. Without citation to state law, the appellate court claimed that the Commissioners Court of Harris County had delegated authority with regard to training and qualification of the deputies to the constables by "acquiescing in each constable's hiring and training policies". See opinion below at p. 10a, *infra*. The appellate court disregarded positive state law which prohibited the Commissioners Court from interfering in the personnel decision of elected officials.[3] See p. 32a, *infra*. To im-

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an instruced verdict before the cause was submitted to the jury, Harris County's knowledge was not an issue, and the appellate court improperly relied on the jury's affirmative response as a basis for its decision to reverse the instructed verdict.

3. Whenever any district, county, or precinct officer when such officer is compensated on a salary basis, with the exception of district attorneys and criminal district attorneys, shall require the services of deputies, assistants and employees in the performance of his duties he shall apply to the County Commissioners' Court of his county for authority to appoint such deputies, assistants and employees, stating by sworn application the number needed, the position to be filled, the duties to be performed, and the amount to be paid. Said application shall be accompanied by a statement showing the probable receipts from fees, commissions and compensation to be collected by said office during the fiscal year and the probable disbursements which shall include all salaries and expenses of said office; and said court shall make its order authorizing the appointment of such deputies, assistants and clerks and fix the compensation to be paid them within the limitations herein prescribed and determine the number to be appointed as in the discretion of said court may be proper; *provided that in no case shall the Commissioners' Court or*

pose liability on the Petitioner County, the appellate court construed the Commissioners Court's after-the-fact budgetary decision to fund a centralized law enforcement academy as an exercise of control over the hiring and training policies of the constables, although such facility was requested by all the county law enforcement officials. The appellate court incorrectly found that both constable Maxon and the Petitioner had authority to establish county policy on the training and qualification of the deputies, claiming that the Petitioner County's budgetary authority vested it with the power to refuse to pay deputies unless they were properly hired and trained. In so concluding, the court ignored explicit statutory provisions which prohibited the Commissioners Court from exercising its budgetary authority to interfere in the personnel decisions of elected county officials.[4]

Relying exclusively on this Court's pronouncements in *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986) (plurality) and *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988) (plurality), the appellate court concluded that a precinct constable was a county policymaker and

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any member thereof attempt to influence the appointment of any person as deputy, assistant or clerk in any office.
(Emphasis added). TEX. REV. CIV. STAT. ANN. art. 3912e, § 19(h) (Vernon 1966) *repealed* by Act of May 21, 1987, 70th Leg. R.S., ch. 149, § 49(l), 1987 Tex. Gen. Laws 1306-1307. This provision was applicable to counties with populations in excess of 190,000. This provision is now codified at TEX. LOC. GOV'T CODE ANN. §§ 151.001-151.004 (Vernon 1988).

4. *See Neeper v. Stewart,* 66 S.W.2d 812 (Tex. Civ. App.—Eastland 1933, writ ref'd); *Renfro v. Shropshire,* 566 S.W.2d 688 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); *Aldrich v. Dallas County,* 167 S.W.2d 560 (Tex. Civ. App.—Dallas 1942, writ dism'd).

remanded the case to the trial court.[5] Confused by the appellate court's apparent disregard for established precedent and unclear as to the purpose of the remand to the trial court, Harris County sought guidance from the Texas Supreme Court. Petitioner was confident that the state's highest court would apply long-standing principles of law to overrule a decision which effectively made the County vicariously liable in a § 1983 suit.[6] An amicus

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5. The appellate court treats identification of policymakers as a fact issue contrary to *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). This is evident from the court's language remanding the case to the trial court: "There was evidence that Constable Maxon was the final policymaking authority in the training of deputy constables in his precinct, and the jury found him liable in his 'official capacity'. There was also evidence the Commissioners Court of Harris County had control over the hiring and training of deputy constables through its power to refuse to pay the deputy constables unless they were properly hired and trained."

6. Policymaking authority of the constable remains an unsettled question under state law. The Texas Supreme Court denied writ in *Luella Merritt, et. al. v. Harris County* ,775 S.W.2d 17 (Tex. App.—Houston [14th Dist.] 1989, writ denied), which held that the eviction procedures of some Harris County constables did not represent Harris County policy because "[u]nder Texas law, Harris County Constables are not policymaking officials of county government when performing the narrowly circumscribed duty to execute a writ of restitution. *Rhode*, 776 F.2d at 109-10. Even though they are elected officials, they do not hold full sway over the tasks entrusted to them so as to constitute official policymaking authority." Additionally, a recent fourteenth court of appeals opinion challenges the appellate opinion in this case by reaffirming the long-standing principle of county government that, ". . . [A]s a matter of law, Harris County has no legal duty to or authority to appoint or terminate deputy constables. Appointment of deputy constables is within the exclusive control of the Constables. . . . The Commissioners Court does exercise budgetary powers over the positions in the constable's office. However, it has no authority by virtue of that budgetary power to appoint or terminate a deputy constable." (Citations omitted). *Renken v. Harris County*, 808 S.W.2d 222, 226 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.).

brief was filed by the Texas Association of Counties, and the County Judges and Commissioners Association of Texas, in protest of the appellate court's unique construction of federal law. Nevertheless, the Texas Supreme Court denied the writ of error with the notation "writ denied", and on May 1, 1991, denied Petitioner's motion for rehearing.[7] Petitioner sought a stay of mandate which was granted by the appellate court, provided that a copy of this petition was filed with the appellate court by July 30, 1991.

REASONS FOR GRANTING THE WRIT

I.

The state court of appeals designation of a precinct constable as a county policymaker violates 42 U.S.C. § 1983's proscription against vicarious liability and conflicts with the decisions of the Fifth Circuit and other Circuits.

The court of appeals opinion is analogous to the story of the emperor with no clothes, how illusion can transform mere decisions into policy statements.[8] The

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7. Tex. R. App. P. 133 states: "In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction, the Court will deny the application with notation 'Writ Denied'."

8. ARIDIZZONE'S HANS ANDERSEN, THE EMPEROR'S NEW CLOTHES (1979). "So the Emperor walked in procession under the magnificent canopy and all the people in the streets, as well as those looking out of their windows, said, 'How incomparably beautiful are the Emperor's new clothes!' 'What a magnificent train he has to his mantle!' 'How perfectly it all matches!' . . . 'But the Emperor hasn't got on anything at all!' cried a little child."

appellate court claimed that the constable was clothed with policymaking authority, yet did not advance a single state law provision which "clothed" this precinct official with the policymaking garb. Instead, the court chose to avoid the conflict with *Rhode* by dismissing it as factually distinguishable.

In 1985, a Fifth Circuit panel comprising of Justices Goldberg, Jolly, and Higginbotham heard two cases involving the policymaking status of two elected officials and reached exactly opposite, yet consistent conclusions. In *Rhode v. Denson,* the court concluded that a constable was not a policymaker for the county; and in *Van Ooteghem v. Gray,* 774 F.2d 1332 (5th Cir. 1985), the court held that an elected county treasurer was the county's policymaker. In *Rhode,* the issue before the court was whether a Texas constable's arrest policies were the policies of the county. In his opinion, Justice Higginbotham stated that a constable of a Texas precinct did not occupy a policymaking position because his edicts or acts did not represent official county policy. The court rejected the simplistic "final authority" test as a basis of policymaking status stating, "[b]ut a person who lacks the power to make policy does not become a policymaker simply because he answers to voters rather than to another official. Direct election of school janitors or toll takers or surveyors answerable only on recall would not make them policymakers." *Id.* at 110. Focusing instead on whether the constable actually made policy for the county, the court concluded that a Texas constable "was not given that discretion, or range of choice, that is at the core of the power to impose one's own chosen policy." *Id.* at 109. Employing the same reasoning, in *Van Ooteghem v. Gray,* the same panel of justices

reached a contrary result because positive state law conferred on the county treasurer exclusive authority in a substantive area of the county's business. The county treasurer had the sole authority to receive county funds, disburse county funds, and to examine the books of all county officers who received county funds. Unlike the precinct constable's arrest practices, the county treasurer's policy restricting an employee's exercise of first amendment rights represented county policy because state law had conferred on the treasurer absolute authority in a particular area of county business. *See City of St. Louis v. Praprotnik.*

The appellate opinion did not cite a single state law provision elevating a constable to a policymaking position. The sole basis for the finding that constable Maxon had an inadequate training policy was that the constable only provided his deputies with state mandated training.[9] See p. 34a, *infra*. The appellate court has concluded that the constable's compliance with the training requirements mandated by state law subjects the Petitioner to constitutional liability, because, in hindsight, the well intentioned efforts of the constable's deputies resulted in an injury.[10] In following the training stand-

9. The Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE), a state agency, was vested with absolute authority to set qualifying standards for hiring, licensing, and training peace officers. TEX. REV. CIV. STAT. ANN. art. 4413 (29aa) (Vernon 1976), *repealed* by Act of May 21, 1987, 70th Leg., R.S., ch. 147, § 6(a), (d), 1987 Tex. Gen. Laws 534. (Now codified at TEX. GOV'T CODE ANN. ch. 415 (Vernon 1988)).

10. "Neither will it suffice to prove that an injury could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program. . . ." *City of Canton, Ohio v. Harris,* 489 U.S. 381, 109 S. Ct. 1197, 1206 (1989).

ards set by state law, the constable's actions were analogous to that of the county judge in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), whose enforcement of a state statute did not impose constitutional liability on the county; and the justice of the peace in *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir.), *cert. denied*, 488 U.S. 822 (1988), who was merely implementing state policy when he failed to permit the appellant to post an appearance bond.[11] Moreover, the *Bigford v. Taylor*, decision re-affirmed the limited non-policymaking role of precinct officials stating, "Judge Buckner, however, was not the Galveston County Judge, but a justice of the peace for one precinct of the county. His job . . . does not involve any of the policymaking functions assigned to the county judge." *Id.* at 1222.

The appellate court's opinion contradicts, at least by implication, the opinion of the Seventh Circuit in *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, ____U.S.____, 110 S. Ct. 2167 (1990), where the court held that a county is not liable for the actions of an elected sheriff because, "[t]he Sheriff is an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners." A constable of a Texas county is also an independently elected precinct officer. The constable answers only to the electorate of his precinct, and his decision to follow state mandated training does not

11. The constable's conduct does not meet the "abuse of government power" standard used by the Fifth Circuit in scrutinizing § 1983 claims against municipalities. Further, Petitioner County could not have abused its governmental power, since it did not have any power to act in this area at all. *See Collins v. City of Harker Heights, Tex.*, 916 F.2d 284 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 1579 (April 15, 1991) (No. 90-1279).

represent the policy of the Petitioner. See p. 34a, *infra*. The appellate court's opinion is also challenged by the Second Circuit's decision in *Baez v. Hennessy,* 853 F.2d 73 (2d Cir. 1988), *cert. denied,* 488 U.S. 1014 (1989), which holds that a district attorney is not the policymaker for the county, because Onondonga County had no authority to establish a policy concerning how the district attorney should perform his duties. The Second Circuit noted that "[w]here, as here, controlling law places limits on the County's authority over the district attorney, the County cannot be said to be responsible for the conduct at issue." *Id.* at 77. Likewise, Texas law prohibited the Petitioner County from exercising authority on the selection or training of the deputies of an elected constable. Texas law placed primary responsibility for the setting of minimum training and qualification standards for peace officers in the hands of a state agency. See p. 34a, *infra* and footnote 9 on p. 9. Elected law enforcement officials could, if they wanted, provide additional training to their personnel and obtain financing for such training from the commissioners courts. It is evident from the Texas statutory scheme that the commissioners courts' involvement in the training of the constable deputies was limited to providing finances, if requested, and if available. For the state court to construe such limited budgetary authority as the power to make policy defies reality.

The state court's opinion gives the Petitioner a Hobson's choice: disregard state law and intrude on the authority of an elected official by a camouflaged use of budgetary powers, or face constitutional liability. Clearly, to hold Petitioner County liable for the alleged actions of a precinct constable is tantamount to imposing vicarious liability on the Petitioner.

II.

The appellate court's adoption of the "final decision making authority" test as the sine qua non of policymaking raises important and recurring questions on the application of 42 U.S.C. § 1983.

The only basis for the appellate court's disregard of settled state law to conclude that a precinct constable was a policymaker for the Petitioner County is that the constable had authority over the hiring and training of his deputies. The constable did have the authority to select his deputies but only *if* they met state mandated training standards, and only *if* they qualified under state law. (See p. 34a, *infra*). This Court has never equated final decisionmaking authority on a given matter with policymaking status. Since *Monell v. Dept. of Social Services of New York*, 436 U.S. 658 (1978), this Court has consistently rejected employer-employee and agency relationships as a species of vicarious liability incompatible with 42 U.S.C. § 1983. Policymakers under *Monell* were either the municipality's lawmakers or those whose edicts and acts represented municipal policy. Under *Monell* the mere finality of a municipal official's decision did not automatically elevate the official to a policymaking status. Yet, lower court decisions attempting to apply this Court's pronouncements in *Monell* and cases following *Monell*, have ofen equated the exercise of final authority with power to make policy. Illustrative is the Eighth Circuit's decision in *Williams v. Butler*, 863 F.2d 1398 (8th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989), a case twice before this Court. In *Williams v. Butler*, the court held that a municipal judge's discharge of a clerk who notified authorities of the judge's illegal activity constituted municipal policy because ". . . Butler was given *carte blanche authority* to hire and

fire his employees." *Id.* at 1399 (emphasis added). In *Williams,* the court found that the City of Little Rock had *delegated* to the municipal judge *final authority* concerning employment matters in the municipal court.[12] From the court's opinion it is clear that the sole basis for finding that a municipal judge was a policymaker was that the *city had delegated* final authority on personnel policy to the judge. Certainly, no statute or city ordinance conferred policymaking status on the municipal judge. The dissenting opinion in *Williams v. Butler,* questioned the soundness of a decision which equated final decisionmaking authority with final policymaking authority. Although the court in *Williams* based its decision on the delegation of policymaking power, it is simplistic and dangerous to equate decisionmaking authority with policymaking power. This Court has never equated mere discretion to make decisions with the power to make policy. *See, Pembaur.*[13]

Indeed, the Fifth Circuit, which first defined a policymaker as one who is the ultimate repository of power in

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12. Contrary to the appellate court's opinion, "delegation" is an improbable source for the decisionmaking authority of the constable. The general rule is that public duties must be performed and governmental powers exercised by the office designated by law; they cannot be delegated to others. *Lufkin v. Galveston,* 56 Tex. 522 (1882). Therefore, unlike the municipal judge in *Williams,* the constable could not have been delegated policymaking power by Petitioner County's policymakers.

13. In addition to final authority, the county prosecutor in *Pembaur* exercised policymaking authority, because first, positive state law vested the Ohio prosecutor with authority to advise the sheriff and his deputies; second, in Hamilton County it was a common practice for the sheriff to seek and receive advice from the prosecutor; third, before breaking down the door to Dr. Pembaur's clinic, the deputies sought the advice of the prosecutor; fourth, the door was broken down on the specific advice of the prosecutor to go in and get the doctor.

a given area, *see Familias Unidas v. Briscoe,* quickly recognized the danger in confusing latitude to make final decision with policymaking status:

> [P]olicymaking authority is more than discretion, and it is far more than the final say-so, as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards. City policymakers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving these goals. Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance.

Bennett v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984), *cert. denied,* 472 U.S. 1016 (1985).

The dangers of confusing decisionmaking authority with policymaking power is best exemplified by this case, where a species of vicarious liability has been considered an acceptable basis for constitutional liability. The appellate court holds that the tort of inadequate training was committed by either constable Maxon and/or the Petitioner. To hold Petitioner responsible for the tort of inadequate training, the appellate court had to be satisfied that the "failure to train amount[ed] to a *deliberate indifference . . . .*" *City of Canton, Ohio v. Harris,* 109 S. Ct. at 1204 (emphasis added). Based exclusively on evidence and testimony about hiring practices, and with no evidence that the four deputies were improperly hired, the appellate court concluded that the constable made a deliberate choice from several known alternatives to inadequately train his deputies.

Can this Petitioner, who was prevented by state law from exercising any authority on the training of constable

deputies, be guilty of deliberate indifference to the rights of the persons with whom the deputies came into contact? Can a municipality's deliberate indifference be inferred from its decision to follow the law?[14] Unable to answer the difficult questions raised by this case, the appellate court ignored positive state law and claimed that Petitioner County could have attached conditions to funding the deputies' positions. Further, the appellate court advanced a novel legal theory, claiming that since the Petitioner funded a centralized law enforcement training institute after the incident, it had the authority to condition funding for deputies positions on compliance with a requisite training standard.[15] Assuming *arguendo* that Petitioner County's budgetary decision was an alleged intrusion into the decisionmaking power of an elected constable, it remained an unauthorized, unlawful, use of budgetary authority. Consequently, the appellate court based its finding of Petitioner County's policymaking authority on the alleged subsequent commission of an unauthorized act by the Petitioner.

The appellate court's result-oriented endorsement of the final authority test overlooks the threshold requirement for municipal liability—that municipal policy be the moving force for the constitutional injury. The recurrent questions facing counties will be: whether a

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14. "Perhaps the most fundamental proposition in county government law in Texas is that the commissioners court can act only as it may be authorized by the state Constitution or statutes. . . ." 35 D. BROOKS COUNTY AND SPECIAL DISTRICT LAW § 5.11 (Texas Practice 1989).

15. The appeals court found that Petitioner failed to interfere in the constable's hiring and training decisions prior to the incident in question. It follows then that at the time of the incident, Petitioner did not have a custom or policy of interfering in the personnel decisions of the constable.

municipality can be liable under § 1983 if it is prohibited by state law from acting in the area which is claimed to have been the source of the constitutional injury?; does construing a precinct official's election from 1/8 of the county as an election at large expose the municipality to a claim for dilution of voting rights by 7/8 of the county residents?; is it constitutional to impose monetary liability on all county voters for the decisions of an official they did not elect and whom they cannot vote out of office?; can a state court base violation of a federal statute on a municipality's failure to violate positive state law?

Will this Court lend its imprimatur to the final decisionmaking authority test as the sine qua non of policymaking powers, when such an application transforms § 1983 liability into vicarious liability?

CONCLUSION

Petitioner respectfully requests this Court to grant certiorari to determine the vital questions raised by the Court of Appeals decision in this case.

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Harris County, Texas

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARRIS COUNTY, TEXAS,
Petitioner,

v.

HARRY WALSWEER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

APPENDIX

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APPENDIX A

JUDGMENT

11th COURT OF APPEALS
EASTLAND, TEXAS

HARRY WALSWEER,

v.

HARRIS COUNTY

(and) No. 11-89-182-CV
(separate appeals)

EDMOND S. "TRACY" MAXON, III,
TIM MARTIN, BRIAN BLACK, COREY
DWAYNE BURKHALTAR, and
JOHN SCHLEIN,

v.

HARRY WALSWEER,

* From the 11th District Court
of Harris County,
Trial Court No. 85-26992.

* August 23, 1990

This cause came on to be heard on the record and same being inspected, it is the opinion of the Court that there was error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial is reversed insofar as it ordered that Harry Walsweer take nothing from Harris County, and that cause is remanded

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* Opinion by Dickenson, J.

to the trial court; and the judgment of the trial court is affirmed insofar as it ordered that Harry Walsweer recover his damages from Edmond S. "Tracy" Maxon, III, Tim Martin, Brian Black, Corey Dwayne Burkhalter, and John Schlein "in their official capacities", all in accordance with this Court's opinion. It is further ordered that the costs incurred by reason of this appeal be, and the same are hereby, taxed one-half against appellee, Harris County, and one-half against appellants, Edmond S. "Tracy" Maxon, III, Tim Martin, Brian Black, Corey Dwayne Burkhalter, and John Schlein, principals, and Lawyers Surety Corporation, surety on the appeal bonds, for which let execution issue, and that this decision be certified below for observance.

APPENDIX B

11th COURT OF APPEALS
EASTLAND, TEXAS

OPINION

HARRY WALSWEER
Appellant

v.

HARRIS COUNTY
Appellee

(and) No. 11-89-182-CV
Separate Appeals from Harris County
EDMOND S. "TRACY MAXON, III,
TIM MARTIN, BRIAN BLACK, COREY
DWAYNE BURKHALTER,
and JOHN SCHLEIN
Appellants

v.

HARRY WALSWEER
Appellee

After calling for police assistance, Harry Walsweer was shot in the back five times by four Harris County deputy constables on September 14, 1984. Walsweer was in his own home at the time of the shooting, and he is now a paraplegic as a result of his gunshot wounds.

Walsweer filed suit under 42 U.S.C.A. § 1983 (West 1981), alleging that he had been deprived of his con-

stitutional rights under the Constitution of the United States. The defendants are Harris County,[1] one of its constables,[2] and four of the constable's deputies.[3] At the close of all the evidence,[4] the trial court granted Harris County's motion for instructed verdict and then submitted the factual disputes as to the other defendants to a jury which answered all questions in Walsweer's favor. Judgment was then rendered that Walsweer take nothing as to Harris County and that he recover $5,799,101.00 plus prejudgment interest of $478,103.20 from all of the other defendants "in their official capacities."[5] Walsweer appeals the instructed verdict, arguing that he is entitled to judgment against Harris County. The constable and all four deputies appeal the judgment rendered against them. We

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1. Harris County was represented at trial and on appeal by Assistant County Attorney Anthony F. Loria.

2. Edmond S. "Tracy" Maxon, III, is one of the eight constables who had been elected by the voters of Harris County as of the date of the shooting, and he is the constable who hired the four deputies who were involved in the shooting. Maxon was represented at trial and on appeal by Assistant County Attorney James C. Faulkner.

3. Two of the deputies, Tim Martin and Brian Black, were fully certified by the State agency which oversees the training of law enforcement officers and have joined in one appellants' brief; they were represented at trial by Assistant County Attorney Lupe Salinas and on appeal by Assistant County Attorney David H. Miller. The other two deputies, Corey Dwayne Burkhalter and John Schlein, were not certified and have joined in a separate appellants' brief; they were represented at trial by Assistant County Attorney Ann Hardy and also by Assistant County Attorney David H. Miller (who represents Martin and Black on appeal); and they are represented on appeal by Assistant County Attorney Ann Hardy.

4. The trial began on February 16, 1988, and the evidence was closed on March 1, 1988.

5. For an explanation of why Walsweer sought judgment against the Constable and his deputies "in their official capacities," See Brandon v. Holt, 469 U.S. 464 at 471 (1985).

reverse and remand as to the instructed verdict, and we affirm as to the judgment against the constable and his deputies.[6]

Factual Background

On the night of September 14, 1984, Walsweer's daughter, Sharri, got into a heated argument with her husband, Mike Sherer. They were separated, and she had filed for divorce. Mike was mad because she had brought a man, Terry Lee Mann (whom she later married), to her parents' home where she was staying with their small child. Walsweer and his wife, Sherron, asked Mike to leave. Sherron came back into the house and asked Sharri to call the police. Sharri called the City of Houston Police Department, and Terry called the Harris County Constable's Office. Walsweer came back into the house and reported that Mike had left.

Shortly thereafter, while Sharri was preparing a bottle for her baby, she saw someone with a gun at the kitchen window. She thought it was Mike, and she dropped to her knees. She called out "Mike's back. He's got a gun." Sherron picked up a .22 caliber pistol and went to the front door. When she opened the door to see if Mike was out there, she saw a red streak come out from underneath a bush. She dove to the floor.[7] Harry Walsweer was

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6. This appeal was transferred from the 1st Houston Court of Appeals to this Court pursuant to TEX. GOV'T CODE ANN. sec. 73.001 (Vernon 1988).

7. The jury rejected the deputies' testimony as to what happened that night. The deputies testified that Mrs. Walsweer came to the door with a gun in her hand and went back inside after they identified themselves as "cops." The deputies also testified that Mr. Walsweer came out after his wife went inside, that he had a gun in his hand which he pointed at two of the deputies before firing at one of them, and that they returned his fire.

standing behind her, about nine feet from the entryway, when he was hit by a hail of bullets. The four deputy constables had all fired at the same time. At least 15 shots were fired, and Walsweer was hit five times. One bullet entered the back of his right shoulder; one entered his right buttocks; one entered his left buttocks; one entered the bend in the back of his right leg; and one entered the bottom of his right foot.

Walsweer was hospitalized for over eight months, and he is now confined to a wheelchair. He has no bowel or bladder control, and he is in constant pain and requires constant care. The stipulated past medical expenses total $731,763.87.

The four deputy constables violated police procedures. Two expert witnesses were of the opinion that the deputy constables' actions were grossly negligent. There was evidence that Constable Edmond S. "Tracy" Maxon, III, had a policy of putting deputy constables on the street with badges and guns before they had been trained and certified. There was also evidence that the Commissioners Court was aware of this policy and that they had budgetary control over the funding of each constable's office. After this incident the Commissioners Court exercised more authority over the staffing of the constables' offices.

The Jury's Verdict

1. Do you find that Precinct 5 Deputy Constables, at the time of the occurrence in question, deprived Plaintiff, Harry Walsweer, of his constitutional rights by shooting at him recklessly and with conscious disregard of a substantial and unjustifiable risk of injury or death?

Answer: Yes.

2. Do you find that such action was a proximate cause of the occurrence in question?

Answer: Yes.

3. Do you find that the Precinct 5 Deputy Constables were grossly negligent on the occasion in question in any one or more of the following particulars: (1) in rushing their approach to the Walsweer residence once they arrived and observed no man in the front yard with a gun; (2) in failing to utilize their radio to radio the dispatcher and request that the dispatcher phone the Walsweer residence and inform the residents that the officers had arrived at the Walsweer residence; (3) in failing to utilize their public address system to inform the residents of the Walsweer home that the officers had arrived at the Walsweer residence; (4) in failing to adequately make their arrival and presence known to the residents of the Walsweer home; (5) in approaching the Walsweer home from the side of the house so as to alarm the residents; (6) in concealing themselves in the trees and bushes in front of the Walsweer home; and (7) in discharging their weapons without adequately advising the residents of Walsweer home of their presence?

Answer: Yes.

4. Do you find that such gross negligence was a proximate cause of the occurrence in question?

Answer: Yes.

5. Do you find that serious incompetence or misbehavior was general or wide spread throughout Precinct 5?

Answer: Yes.

6. Do you find that such incompetence or misbehavior was known by Harris County?

Answer: Yes.

7. Did Tracy Maxon have an official policy or custom of providing inadequate training to Deputy Constables in Precinct 5?

Answer: Yes.

8. Did that official policy or custom constitute "gross negligence"?

Answer: Yes.

9. Was that gross negligence a proximate cause of the occurrence in question?

Answer: Yes.

9A. Was such action or gross negligence attributable to the policy or custom found by you in Answer to question No. 9 to be a proximate cause of the occurrence in question?

Answer: Yes.

The stipulated past medical expenses and the jury's findings on the other elements of damages come to a total of $5,799,101.87. None of the appellants have challenged any of the damage findings.

Walsweer's Appeal

Walsweer argues that the trial court erred in granting an instructed verdict that he take nothing on his claim against Harris County. We agree.

Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured* in an action at law,

suit in equity, or other proper proceeding for redress. (Emphasis added)

This statute was enacted in 1871, but it was not applied to governmental units until 1978 when the United States Supreme Court reexamined the legislative history and concluded that "municipalities and other local governmental units" are "persons" within the meaning of Section 1983. See Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). *Monell* requires a plaintiff to show that his or her injuries resulted from a governmental "policy or custom." 436 U.S. at 694. *Monell* defines "policy" as "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. *Monell* defines "custom" as a "persistent and widespread" practice even though it has not been officially adopted. 436 U.S. at 691.

The United States Supreme Court has also made it clear that: "good faith" is not a defense to claims under Section 1983;[8] the states' sovereign immunity is not a defense;[9] and the governmental-proprietary distinctions are of no consequence.[10]

It is also clear that a county is liable under Section 1983 for civil rights violations resulting from the actions of a county official who had "final policymaking authority." See Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). Six of the justices agreed that Hamilton County could be liable for the actions of deputy sheriffs who followed instructions which they received from the county

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8. See Owen v. City of Independence, Missouri, 445 U.S. 622 at 638, *rehearing denied*, 446 U.S. 993 (1980).

9. See Daniels v. Williams, 474 U.S. 327 (1986).

10. See Owen v. City of Independence, Missouri, 445 U.S. at 644.

prosecutor. The Court held that the county prosecutor was an official with authority to make policy respecting law enforcement practices. (Brennan, J., joined by Marshall and Blackmun, JJ.; White, J., concurring; Steven, J., concurring; and O'Connor, J., concurring). The plurality opinion noted:

> The Deputy Sheriffs . . . sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner's clinic. That decision directly caused the violation of petitioner's Fourth Amendment rights.
>
> Respondent [Hamilton County] argues that the County Prosecutor *lacked authority to establish municipal* [*county*] *policy respecting law enforcement practices because only the County Sheriff may establish policy respecting such practices.* . . . We decline to accept respondent's invitation to overlook this delegation of authority. (Emphasis added)

As in *Pembaur*, the record is clear that Constable Maxon had authority to establish county policy as to the training and qualification of the deputies in his precinct. The Commissioners Court had delegated that authority to the constables by acquiescing in each constable's hiring and training policies. The Commissioners Court had budgetary control over each constable. Indeed, after the regrettable incident which led to Walsweer's injuries, the Commissioner Court exercised additional control over the hiring and training policies of the constables. See and compare City of Canton, Ohio v. Harris, 489 U.S.____, 109 S. Ct.____, 103 L.

Ed.2d 412 at 427 (1989), where the Supreme Court held that a municipality could be liable under Section 1983 for constitutional violations resulting from its failure to properly train police officers if:

> [T]he need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the policy-makers of the city can reasonably be said to have been deliberately indifferent to the need.

In granting Harris County's motion for instructed verdict, the trial court understandably relied on Rhode v. Denson, 776 F.2d 107 (5th Cir. 1985), *rehearing en banc den'd*, 778 F.2d 790, *cert. den'd*, 476 U.S. 1170 (1986), where the Fifth Circuit held that a constable "lacked the power to make county policy." *Rhode* is factually distinguishable because Harris County argued in this case that Constable Maxon was the final authority in his precinct on the selection, training, and activities of his deputies. The county cannot escape liability by now arguing that the constable did not have policy-making powers in his portion of the county. The Supreme Court held that a county could be held liable for the policies established by the county prosecutor in *Pembaur*. Moreover, the Court in *Rhode* was facing an isolated incident while the evidence before us shows that Constable Maxon's policies were of long standing duration and were well known to the Commissioners Court which continued to pay several hundred deputies who had been employed by him.

The jury in this case specifically found that the "serious incompetence or misbehavior" in Constable Maxon's

precinct "was known by Harris County." The jury also found that Constable Maxon had "an official policy or custom of providing inadequate training" to his deputies. The trial court rendered judgment against Constable Maxon and the four deputies "in their official capacities."

Walsweer has briefed three points of error. He argues that the district court erred: (1) in granting an instructed verdict to Harris County because there was ample evidence that Constable Maxon was the county's policymaker (as to the hiring and training of deputies in his precinct); (2) in granting an instructed verdict to Harris County because there was some evidence that its Commissioners Court was the county's policymaker (as to the hiring and training of deputy constables); and (3) in excluding evidence relevant to the policy or custom of Harris County (in hiring and training deputy constables). We sustain all three points of error.

There was evidence that Constable Maxon was the final policy-making authority in the training of deputy constables in his precinct, and the jury found him liable in "his official capacity." There was also evidence the Commissioners Court of Harris County had control over the hiring and training of deputy constables through its power to refuse to pay the deputy constables unless they were properly hired and trained. In reviewing an instructed verdict, an appellate court is required to view the evidence in the light most favorable to the non-movant, disregarding all evidence and inferences which are contrary to the non-movant's position. See, e.g., Henderson v. Travelers Insurance Company, 544 S.W.2d 649 at 650 (Tex. 1976).

The Other Appeal

Three separate appellants' briefs were filed by three different assistant county attorneys: one for the elected Constable, Edmond S. "Tracy" Maxon, III; one for the two certified deputy constables, Tim Martin and Brian Black; and one for the uncertified deputies, Corey Dwayne Burkhalter and John Schlein.

Constable Maxon presents three points of error, all of which are directed at Questions 9 and 9A. He argues that the trial court erred in overruling his objections to these questions and his motion for new trial because the questions asked if his "official policy of inadequate training" was *a proximate cause of the occurrence,* arguing that the controlling law requires them to be submitted as to whether the policy was *a moving force* rather than a proximate cause.

Martin and Black present four points of error. They argue that the trial court erred: (1) in overruling their motion for mistrial because the prejudicial effect of the testimony of Katherine Newman (about the service of citation on Constable Maxon) far outweighed its probative value; (2) in overruling their motion for instructed verdict because "there was no evidence to submit to the jury Questions Nos. 1 through 4"; (3) in overruling their motion for judgment non obstante veredicto because "there was no evidence to support the jury's answers to Questions Nos. 1 through 4"; and (4) in overruling their objections to the submission of Questions 2 and 4 in terms of "proximate cause" rather than "moving force."

Burkhalter and Schlein present ten points of error. The first four points relate to the motion for mistrial, and they overlap with Martin and Black's first point of error. In Points 5 and 6, they argue that the trial court erred in overruling their objections to the charge because "the instructions were an incorrect statement of the law" and probably caused an improper verdict. In Points 7 and 9, they argue that "there was no evidence to support the jury's answer" to Questions 1 and 3, and, in Points 8 and 10, they argue that the trial court erred in overruling their "objections to the form of answer" to Questions 1 and 3. Points 7 and 9 overlap with Martin and Black's Points 2 and 3.

All of the points of error filed by the constable and his deputies have been considered, and each is overruled.

The court's submission of these questions to the jury is correct. "Proximate cause" (not "moving force") is the correct legal standard of causation for recovery under Section 1983 actions. See Grandstaff v. City of Borger, Texas, 767 F.2d 161 at 168 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). See also Kritchevsky, *"Or Causes To be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 U.C.L.A. L. REV. 1187 at 1193 (1988).

There is evidence to support the jury's answers to each of the challenged questions. These contentions have been reviewed in compliance with Martinez v. Delta Brands, Inc., 515 S.W.2d 263 at 265 (Tex. 1974):

> When a party asserts that there is no evidence to support jury findings, *we must review the evidence in its most favorable light, considering only the evidence and inferences which support the findings,*

and rejecting the evidence and inferences contrary to the findings. (Emphasis added)

The trial court did not err in permitting evidence as to the service of citation on Constable Maxon to impeach his credibility. During his direct examination as an adverse witness, Constable Maxon testified:

> Q: Are you here voluntarily or by subpoena, Mr. Maxon?
>
> A: Voluntarily.
>
> Q: Were you not, in fact, subpoenaed day before yesterday to appear and testify in this case?
>
> A: No. I found the subpoena one morning in my driveway.
>
> * * *
>
> Q: Let me show you what's been marked as Plaintiff's Exhibit 28, and ask you based upon your background what that is?
>
> A: Looks like a subpoena from a private process server where they say they served me on the night of my anniversary.
>
> Q: What night was that?
>
> A: The 22nd [of February 1988].
>
> Q: You don't recall receiving that subpoena personally?
>
> A: Sir, I did not receive that subpoena personally.
>
> Q: Did you get involved in an altercation with the person serving—
>
> A: I never met anybody trying to serve that subpoena on me. [He also testified that there was no dollar attached to the subpoena.]

Katherine Newman testified as an impeachment witness, contradicting Maxon's testimony, by giving the following testimony:

Q: Let me show you what's been marked as Plaintiff's Exhibit No. 28 in this case and ask you if you've ever seen that or recognize that?

A: Yes, sir. I do.

Q: How is it that you know something about Plaintiff's Exhibit 28?

A: Because I served the subpoena on Mr. Maxon.

* * *

Q: Tell the members of the jury, Ms. Newman, how it is that you're sure that's the man you served that subpoena on?

A: Mr. Maxon pulled a .357 on me and shoved me in the corner of his porch.

* * *

Q: Was there a dollar attached to it when you subpoenaed Mr. Maxon?

A: Yes, sir. It was attached to the piece of paper.

Q: Okay.

A: At the top.

Q: I assume the reason there is no signature down here—did Mr. Maxon after pulling the pistol refuse to sign it?

A: Yes, sir.

Q: I assume that you left rather quickly at that stage?

A: Yes, sir. When he was through with me.

After lengthy discussions outside the presence of the jury, the trial court overruled the motion for mistrial which was urged by all of the appellees. The trial court then instructed the jury as follows:

I apologize to you, ladies and gentlemen, but the case has developed several difficult legal problems which counsel and the Court needed to solve. Now,

> I'm going to read it to you, an instruction on behalf of the defendants in this case arising out of the testimony that you heard yesterday evening. And here is the instruction to the jury. There was evidence presented before this jury that he had, Tracy Maxon, allegedly pointed a handgun at an individual who was attempting to serve a subpoena on him on February 22, 1988. Such evidence, if true, would possibly constitute a criminal offense committed by Ed Tracy Maxon.
>
> To the extent that such testimony is found credible by you, then you should not and are not to consider in any way evidence of this extraneous or unrelated matter against any of the four deputy constables, namely: Tim Martin, Brian Black, Corey Burkhalter, and John Schlein, and Harris County, who are named as Defendants in this case.

Maxon's brief does not attack the admissibility of this impeachment testimony, and we hold that the limiting instruction was sufficient to cure any complaint urged by the other appellants. They have not shown reversible error under TEX.R.APP.P 81(b)(1).

This Court's Ruling

The judgment of the trial court is reversed insofar as it ordered that Harry Walsweer take nothing from Harris County, and that cause is remanded to the trial court. The judgment of the trial court is affirmed insofar as it ordered that Harry Walsweer recover his damages from Edmond S. "Tracy" Maxon, III, Tim Martin, Brian Black, Corey Dwayne Burkhalter, and John Schlein "in their official capacities."

Reversed and remanded in part; affirmed in part.

/s/ BOB DICKENSON
Bob Dickenson
JUSTICE

August 23, 1990
Publish. See TEX.R.APP.P. 90.

APPENDIX C

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

April 3, 1991

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RE: Case No. D-0541
Style: HARRIS COUNTY, TEXAS; COREY BURKHALTER AND JOHN SCHLEIN ET AL.
v. HARRY WALSWEER

Dear Counsel:

The applications for writ of error in the above-styled case were this day denied with the notation, Writ Denied.

Sincerely,
John T. Adams, Clerk
By: /s/ BLANCA E. MORIN
Blanca Morin, Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 1, 1991

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RE: Case No. D-0541
Style: HARRIS COUNTY, TEXAS; COREY BURKHALTER AND JOHN SCHLEIN ET AL.
v. HARRY WALSWEER

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk
By: /s/ COURTLAND CROCKER
Courtland Crocker, Deputy

APPENDIX E

42 U.S.C. § 1983

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

APPENDIX F

Texas Constitution—

§ 18. *Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court*

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As Amended Nov. 2, 1954.

INTERPRETIVE COMMENTARY

The origin of the Texas county is found in the "municipality", the unit of local government under

Spanish and Mexican rule. These municipalities were rather large districts embracing one or more settlements and the surrounding rural territory. The government of the municipality was vested in an *ayuntamiento* (council), composed of at least one *alcade* (judge), a varying number of *regidores* (aldermen), a *sindicoprocurador* (attorney), an *alguacil* (sheriff), and an *escribano* (secretary).

Under the Republic, the municipalities became counties, but the Spanish-Mexican influence on their government was negligible. The new local governments were based on the county as found in the southern part of the United States. The governing body designated for the counties was a county board, better known as the county commissioners court. At first this board consisted of the chief justice of the county court, the justices of the peace, and the commissioners of roads and revenues. Since the Constitution of 1836 contained no provision for the selection of the commissioners of roads and revenues, the county commissioners courts were actually composed of the chief justice and the justices of the peace. In 1839 this condition was legalized by dropping the theoretical commissioners of roads and revenues. Thus, during the Republic, the county boards were composed of a chief justice of the county court and the justices of the peace. This close connection between county affairs and judicial affairs has been retained to the present time.

County government under the Constitution of 1845, varied only in minor detail from that under the Republic, the major changes being the election of all officials and the creation of a few new ones. When Texas entered the Confederacy in 1861 and adopted a new state constitution, no changes were made in county government, nor were any really significant ones made by the Constitution of 1866.

The government as set up by that constitution lasted only a short while because of the passage of the Reconstruction Acts in 1867. Under the military rule which followed many local officials were removed indiscriminately and were either not replaced or else new officials were appointed. This situation lasted until 1870, when the government was reorganized under the Constitution of 1869.

The Constitution of 1869 provided for a county commissioners court (county board) resembling that provided by the Constitution of the Republic. It was made up entirely of judicial officials but contained no chief justice of a county court nor elected lay commissioners as had those immediately preceding. Rather, it was to be constituted by three of the five justices of the peace of the county. The justice who lived at the county seat was the presiding officer.

Changes were made in the number, titles and functions of the county officials, and the functions of the county commissioners court saw minor changes. Nevertheless the county government contined to be pretty much what it had been. In fact, despite the governmental organization as set forth in the Constitution of 1869, the actual administration up to 1873 was practically a continuation of congressional reconstruction. Laws were passed extending the terms of those in office for an additional year, and giving the governor power to appoint various elective local officials. The governor under this provision was able to appoint about 8,000 persons of which some 1,700 were local officials.

After the election of 1873, the radical republican element was overthrown, and the democrats started a movement for a new constitution. In 1875 a new instrument was drafted and it was adopted the following year. The new constitution contained many specific provisions concerning counties, specifying in

detail their organization and stating the terms, method of selection, and in certain cases the duties of the officers. The chief governing agency continued to be the county commissioners court. A break with tradition had been made under the Constitution of 1869 when the county board, or commissioners court, was composed of any three elected justices of the peace in the county. Under the present Constitution, the county commissioners court reverted to its previous form, and is now composed of a county judge and four lay commissioners elected from precincts.

The Constitution largely specified the duties of the county board and together with subsequent legislation forms the basis of major county functions. The constitution also provided for an elective county judge, attorney, sheriff, tax assessor and collector, clerk, surveyor, treasurer, justices of the peace, and constables. Terms of all officers were again made two years.

In November, 1954, this section was amended increasing the terms of office of Justices of the Peace, Constables, and County Commissioners from two to four years, in the interest of obtaining increased efficiency in the administration of county government.

The close restrictions placed in the constitution relative to counties made fundamental changes in the organization of counties almost impossible. In 1930 there was initiated a movement for county home rule to overcome this inflexible control. A constitutional amendment providing for county home rule was passed by the legislature in 1933 and approved by the voters the same year. (See Art. 9, Sec. 3.)

Counties have a dual nature. That is to say their functions are of both state and local significance. They may be considered as merely administrative

areas of the state in that powers conferred upon them are more in the nature of duties imposed than privileges granted. They have no powers or duties other than those clearly set forth and defined in the constitution and statutes. They were created to carry out a policy common to the whole state and not mainly to advance the interests of the particular locality.

On the other side of the dual nature of the counties is "localism". The county is a local area having all the attributes of a unit of government. The election of the various county officials insures in most instances the application of state laws and regulations in the light of local conditions.

The county commissioners court, then, has none of the functions of a court, but is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments.

APPENDIX G

§ 24. *Removal of county officers*

Sec. 24. County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

INTERPRETIVE COMMENTARY

The power of removal in England, at common law, was resident in the king. In the United States it rests with the people, and may be executive, judicial or legislative, depending upon the manner in which the people in the specific instance have given or bestowed the power of removal.

As the right to hold office is not a vested right, the constitution may provide methods by which the incumbents of office may be removed before the expiration of their terms. Where the constitution prescribes a mode for removing officers, the legislature may not authorize a removal by another manner. Where the power of removal is limited to specific causes, the removing authority may not remove for any cause not so specified.

The Texas constitution, like that of many other states, provides for the removal of certain named public officers by proceedings in the nature of judicial proceedings. While in some jurisdictions such proceedings are held to be criminal or quasi-criminal in character, in other jurisdictions a contrary view is held. It has also been declared that such proceedings, being governed by the special practice provided therefor are neither civil nor criminal.

The obscurity and difference of opinion in interpretation of statutes of this kind no doubt often arises out of the fact that misfeasance and malfeasance in office were crimes at common law. The procedure at common law always contemplated a prosecution by indictment or information, and conviction was followed by a fine and imprisonment.

But in modern statutes and constitutions which make no provision for punishment of any kind, beyond removal from office, the proceeding is plainly intended to rid the public of an incompetent and unworthy public servant, and the proceedings are, in this particular, entirely different in nature from original common law proceedings.

The object of the proceeding is not to punish the officer for any crime or dereliction, but to remove him from his office in the interest of the public, so that the office may be filled and the function thereof exercised by some competent individual. Such principles of the criminal law which are engrafted upon the proceedings are designed for the protection of the officer himself. And such proceedings do not prevent, at some later date, the institution of criminal proceedings on an indictment if the offense for which the officer is removed is punishable criminally.

The purpose in providing for the removal of the named public officials by special proceedings, as envisioned by the authors of the constitution, was to provide a summary remedy which, by avoiding technical delays, might protect the public from the acts of incompetent or dishonest officials.

APPENDIX H

FEES OF OFFICE

Art. 3912e . . .

(h) Whenever any district or county officer, or precinct officer when such officer is compensated on a salary basis, with the exception of district attorneys and criminal district attorneys, shall require the services of deputies, assistants, and employees in the performance of his duties he shall apply to the Commissioners' Court for authority to appoint such deputies, assistants, and employees, stating by sworn application the number needed, the position to be filled, the duties to be performed, and the amount to be paid. Said application shall be accompanied by a statement showing the probable receipts from fees, commissions, and compensation to be collected by said office during the fiscal year and the probable disbursements which shall include all salaries and expenses of said office; and said court shall make its order authorizing the appointment of such deputies, assistants, and clerks and fix the compensation to be paid them within the limitations herein prescribed and determine the number to be appointed as in the discretion of said court may be proper: *provided that in no case shall the Commissioners' Court or any member thereof attempt to influence the appointment of any person as deputy, assistant, or clerk in any office.* Upon the entry of such order the officers applying for such deputies, assistants, and employees shall be authorized to appoint them; provided that said compensation shall not exceed the maximum amount hereinafter set out. The maximum compensation which may be allowed to the deputies, assistants, or clerks above named for their services shall be as follows: . . .

Provided, that in counties having a population of three hundred and fifty-five thousand (355,000) or more, according to the last preceding Federal Census, whenever any district or county officer, or precinct officer when such precinct officer is compensated on a salary basis, with the exception of district attorneys and criminal district attorneys, shall require the services of deputies, assistants, and employees, in the performance of his duties, he shall apply in writing to the Commissioners Court of his county for authority to appoint such deputies, assistants, and employees, such written application to be sworn to and to set forth the number needed, the positions to be filled, the duties to be performed, and the amount of compensation to be paid. Each such application shall be accompanied by a statement showing the probable receipts from fees, commissions, and compensation to be collected by the office of the officer so applying during the fiscal year and the probable disbursements to be made by such office during such fiscal year, which shall include all salaries and expenses of such office, and said Court shall make its order authorizing the appointment of such deputies, assistants, and employees, and fix the compensation to be paid them within the limitation herein prescribed and determine the number to be appointed, as in the discretion of said Court may seem proper; *provided that in no case shall the Commissioners Court, or any member thereof, attempt to influence the appointment of nay person as a deputy, assistant, or employee in any office.* Upon the entry of such order the officer applying for such deputies, assistants, and employees, shall be authorized to appoint them, provided that the compensation to be paid them shall not exceed the maximum

amount hereinafter set out. The maximum compensation which may be allowed to the deputies, assistants, and employees of the officers hereby affected for their services shall be as follows: . . .

APPENDIX I

Art. 4413(29aa). Commission on Law Enforcement Officer Standards and Education

Creation

Section 1. There is hereby created the Commission on Law Enforcement Officer Standards and Education, hereinafter called "Commission."

Powers of Commission

Sec. 2. The Commission shall have the authority and power to:

(a) Promulgate rules and regulations for the administration of this Act including the authority to require the submission of reports and information by any state, county, or municipal agency within this state which employs peace officers.

(b) Establish minimum educational, training, physical mental and moral standards for admission to employment as a peace officer: (1) in permanent positions, and (2) in temporary or probationary status.

(c) Certify persons as being qualified under the provisions of this Act to be peace officers.

(d) Certify persons having qualified as law enforcement officer instructors under such conditions as the Commission may prescribe.

(e) Establish minimum curriculum requirements for preparatory, in-service and advanced courses and programs for schools or academies operated by or for the state or any political subdivisions thereof for the specific purpose of training peace officers or recruits for the position of a peace officer.

(f) Consult and cooperate with counties, municipalities, agencies of this state, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of peace officer training schools and programs of courses of instruction.

(g) Approve, or revoke the approval of, institutions and facilities for schools operated by or for the state or any political subdivision thereof for the specific purpose of training peace officers or recruits for the position of peace officer, and issue certificates of approval to such institutions and revoke such certificates of approval.

(h) Operate schools and facilities thereof and conduct courses therein, both preparatory, in-service, basic and advanced courses, for peace officers and recruits for the position of peace officer as the Commission may determine.

(i) Contract with other agencies, public or private, or persons, as the Commission deems necessary for the rendition and affording of such services, facilities, studies and reports as it may require to cooperate with municipal, county, state and federal law enforcement agencies in training programs, and to otherwise perform its functions.

(j) Make or encourage studies of any aspect of law enforcement, including police administration.

(k) Conduct and stimulate research by public and private agencies which shall be designed to improve law enforcement and police administration.

(*l*) Employ an Executive Director and such other personnel as may be necessary in the performance of its functions.

(m) Visit and inspect all institutions and facilities conducting courses for the training of peace officers and recruits for the position of peace officer and make evaluations as may be necessary to determine if they are complying with the provisions of this Act and the Commission's rules and regulations.

(n) Adopt and amend rules and regulations, consistent with law, for its internal management and control.

(*o*) Accept any donations, contributions, grants or gifts from private individuals or foundations or the federal government.

(p) Report annually to the Governor and to the Legislature at each regular session on its activities, with its recommendations relating to any matter within its purview, and make such other reports as it deems desirable.

(q) Meet at such times and places in the State of Texas as it deems proper; meetings shall be called by the Chairman upon his own motion, or upon the written request of five members.

(r) Establish procedures for the revocation of certificates issued to a peace officer under the provisions of this Act.

Reserve officers; minimum standards

Sec. 2A. (a) The Commission on Law Enforcement Officer Standards and Education shall establish minimum training standards for all reserve law enforcement officers which must be fulfilled before a person appointed as a reserve law enforcement officer may carry a weapon or otherwise act as a peace officer.

(b) The Commission shall establish minimum physical, mental, educational, and moral standards for all reserve law enforcement officers.

Reporting standards and procedures

Sec. 2B. (a) The Commission shall establish such reporting standards and procedures for matters of employment and termination of peace officers by law enforcement agencies, for matters concerning the activities of certified training academies, and for other matters it deems necessary for the administration of this Act.

(b) The Commission shall furnish each agency and certified training academy with the required reporting forms.

(c) The chief administrative officer of a law enforcement agency or certified training academy shall be responsible for compliance with the reporting standards and procedures.

Membership; qualifications and terms; vacancies

Sec. 3. The Commission shall be composed of nine members, residents of the State of Texas, and appointed by the Governor with the advice and consent of the Senate. Such members shall be persons well qualified by experi-

ence or education in the field of law enforcement. The Commissioner of Higher Education of the Coordinating Board, Texas College and University System, Commissioner of the Texas Education Agency, the Director of the Texas Department of Public Safety and the Attorney General shall serve as ex officio members of the Commission. In the event a public officer shall be appointed, service by such officer or officers shall be an additional duty of the office. Such appointive members shall be appointed for a term of six years, provided, however, that of the members first appointed, three shall be appointed for a term of two years, three for a term of four years, and three for a term of six years. Any member chosen by the Governor to fill a vacancy created otherwise than by expiration of term shall be appointed for the unexpired term of the member he is chosen to succeed. Such appointment for unexpired term shall be with the advice and consent of the Senate.

Officers; quorum; meetings

Sec. 4. The Commssion shall elect a chairman, vice-chairman, and secretary from among the appointed members at its first meeting, and thereafter at its first meeting succeeding new appointments to fill regular terms. Five members shall constitute a quorum. The Governor shall summon the Commission to its first meeting.

Compensation; expenses

Sec. 5. Members of the Commission shall receive no compensation for their services but shall be allowed their actual and necessary expenses incurred in the performance of their functions hereunder.

Peace officers; tenure; probationary appointments; training

Sec. 6. (a) Peace officers already serving under permanent appointment prior to September 1, 1970, shall not be required to meet any requirement of Subsections (b) and (c) of this section as a condition of tenure or continued employment, nor shall failure of any such officer to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible. The Legislature finds, and it is hereby declared to be the policy of this Act, that such peace officers have satisfied such requirements by their experience.

(b) No person after September 1, 1970, shall be appointed as a peace officer, except on a temporary or probationary basis, unless such person has satisfactorily completed a preparatory program of training in law enforcement at a school approved or operated by the Commission. Any peace officer who has received a temporary or probationary appointment as such on September 1, 1970, or thereafter, and who fails to satisfactorily complete a basic course in law enforcement, as prescribed by the Commission, within a one-year period from the date of his original appointment, shall forfeit his position as a peace officer and shall be removed therefrom; and may not have his temporary or probationary employment extended beyond one year by renewal of appointment or otherwise; except that after the lapse of one year from the date of his forfeiture and removal, a local law enforcement agency may petition the Commission for reinstatement of temporary or probationary employment of such individual, such reinstatement resting within the sole discretion of the Commission.

(c) In addition to the requirements of Subsection (b) of this section, the Commission, by rules and regulations, may establish other qualifications for the employment of peace officers, including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of peace officers, and the Commission shall prescribe the means of presenting evidence of fulfillment of these requirements. No person shall be appointed as a peace officer unless he fulfills such requirements.

(d) The Commission shall issue a certificate evidencing satisfaction of the requirements of Subsections (b) and (c) of this section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the Commission for approved law enforcement education and training programs in this state.

(e) Any person who accepts appointment as a peace officer, or any person who appoints or retains an individuaal as a peace officer, in violation of Subsections (b) or (c) of this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00).

(f) Nothing herein shall be construed to preclude an employing agency from establishing qualifications and standards for hiring or training peace officers which exceed the minimum standards set by the Commission

nor shall anything herein be construed to affect any sheriff, constable or other law enforcement officer elected under the provisions of the Constitution of the State of Texas.

(g) Any peace officer already serving under permanent appointment prior to September 1, 1970, and any sheriff, constable, or other law enforcement officer elected to office under the provisions of the Constitution of the State of Texas, shall be eligible to attend peace officer training courses subject to the rules and regulations established by the Commission.

(h) "Peace officer," for the purposes of this Act, means only a person so designated by Article 2.12, Code of Criminal Procedure, 1965, and by Section 51.212, Texas Education Code.

Revocation of certificate

Sec. 6A. The Commission may revoke a certificate issued to a peace officer under the provisions of this Act if the Commission determines that the officer has violated a rule, regulation, requirement, specification, or other standard established by the Commission. The Commission shall revoke a certificate issued to a peace officer under the provisions of this Act if the officer is convicted in any state or federal court of a felony.

Peace officer training programs

Sec. 7. (a) The Commission shall establish and maintain peace officer training programs to be conducted by its own staff or through such agencies and institutions as the Commission may deem appropriate.

(b) The Commission may authorize reimbursement for each political subdivision an deach state agency for expenses in attending such training programs as authorized by the Legislature.

Powers and duties of municipal or county governments

Sec. 8. Except as expressly provided in this Act, nothing herein contained shall be deemed to limit the powers, rights, duties and responsibilities of municipal or county governments, nor to affect provisions of Article 1269m, Fire and Police Civil Service Acts of the Vernon's Civil Statutes.

Convicted felons as peace officers

Sec. 8A. (a) No person who has been convicted of a felony under the laws of this state, another state, or the United States may be certified by the Commission as qualified to be a peace officer.

(b)Final conviction of a felony under the laws of this state, another state, or the United States disqualifies a person previously certified by the Commission as qualified to be a peace officer, and the Commission shall immediately revoke the certification of a person so convicted.

Funds

Sec. 9. The Legislature of the State of Texas shall appropriate the necessary funds for the purpose of carrying out the provisions of this Act.

Appeals

Sec. 9A. Any person dissatisfied with the action of the Commission may appeal the action of the Commission by filing a petition within thirty (30) days thereafter in the district court in the county where the person resides or in the district court of Travis County, Texas, and the court is vested with jurisdiction, and it shall be the duty of the court, to set the matter for hearing upon ten (10) days written notice to the Commission and the attorney representing the Commission. The court in which the petition of appeal is filed shall determine whether any action of the Commission shall be suspended pending hearing, and enter its order accordingly, which shall be operative when served upon the Commission, and the Commission shall provide the attorney representing the Commission with a copy of the petition and order. The Commission shall be represented in such appeals by the district or county attorney of the county, or the Attorney General, or any of their assistants.

Acts 1965, 59th Leg., p. 1158, ch. 546. Amended by Acts 1969, 61st Leg., p. 998, ch. 323, §§ 1 to 5, eff. Sept. 1, 1969; Acts 1971, 62nd Leg., p. 1739, ch. 506, § 3, eff. Aug. 30, 1971; Acts 1975, 64th Leg., p. 637, ch. 262, § 1, eff. Sept. 1, 1975; Acts 1975, 64th Leg., p. 1807, ch. 547, § 1, eff. Sept. 1, 1975; Acts 1975, 64th Leg., p. 1808, ch. 548, § 1, eff. Sept. 1, 1975; Acts 1975, 64th Leg., p. 1809, ch. 549, §§ 1, 2, eff. Sept. 1, 1975.

PEACE OFFICERS, JAILERS AND GUARDS, AND RESERVE LAW ENFORCEMENT OFFICERS—LICENSURE

CHAPTER 757

H. B. No. 2236

An Act relating to licensing of peace officers, jailers and guards of county jails, and reserve law enforcement officers by the Commission on Law Enforcement Officer Standards and Education.

Be it enacted by the Legislature of the State of Texas:

Sec. 1. Sec. 2, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413 (29aa), Vernon's Texas Civil Statutes), is amended[17] to read as follows:

Sec. 2. The Commission shall have the authority and power to:

(a) Promulgate rules and regulations for the administration of this Act including the authority to require the submission of reports and information by any state, county, or municipal agency within this state which employs peace officers, jailers or guards of county jails, or reserve law enforcement officers.

(b) Establish minimum standards that relate to competence and reliability, including education, training, physical, mental and moral standards for licensing as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer: (1) in permanent positions, and (2) in temporary or probationary status.

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17. Vernon's Ann. Civ. St. art. 4413(29aa), § 2.

(c) Issue temporary or permanent licenses to persons qualified under the provisions of this Act to be peace officers, jailers or guards of county jails, or reserve law enforcement officers.

(d) Certify persons as having qualified as instructors under such conditions as the Commission may prescribe.

(e) Establish minimum curriculum requirements for preparatory, in-service and advanced courses and programs for schools or academies operated by or for the state or any political subdivisions thereof for the specific purpose of training peace officers, jailers and guards of county jails, or reserve law enforcement officers, or recruits for those positions.

(f) Consult and cooperate with counties, municipalities, agencies of this state, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of training schools and programs of courses of instruction for peace officers, and programs of courses of instruction for peace officers, jailers or guards of county jails, or reserve law enforce-

(g) Approve, or revoke the approval of, institutions and facilities for schools operated by or for the state or any political subdivision thereof for the specific purpose of training peace officers, jailers and guards of county jails, reserve law enforcement officers, or recruits for those positions, and issue certificates of approval to such institutions and revoke such certificates of approval.

(h) Operate schools and facilities thereof and conduct courses therein, both preparatory, in-service, basic and advanced courses, for peace officers, jailers or guards of

county jails, or reserve law enforcement officers, and recruits for those positions as the Commission may determine.

(i) Contract with other agencies, public or private, or persons, as the Commission deems necessary for the rendition and affording of such services, facilities, studies and reports as it may require to cooperate with municipal, county, state and federal law enforcement agencies in training programs, and to otherwise perform its functions.

(j) Make or encourage studies of any aspect of law enforcement, including police administration.

(k) Conduct and stimulate research by public and private agencies which shall be designed to improve law enforcement and police administration.

(*l*) Employ an Executive Director and such other personnel as may be necessary in the performance of its functions.

(m) Visit and inspect all institutions and facilities conducting courses for the training of peace officers, jailers or guards of county jails, or reserve law enforcement officers, and recruits for those positions, and make evaluations as may be necessary to determine if they are complying with the provisions of this Act and the Commission's rules and regulations.

(n) Adopt and amend rules and regulations, consistent with law, for its internal management and control.

(*o*) Accept any donations, contributions, grants or gifts from private individuals or foundations or the federal government.

(p) Report annually to the Governor and to the Legislature at each regular session on its activities, with its recommendations relating to any matter within its purview, and make such other reports as it deems desirable.

(q) Meet at such times and places in the State of Texas as it deems proper; meetings shall be called by the Chairman upon his own motion, or upon the written request of five members.

(r) Establish procedures for the revocation of licenses issued to a peace officer, a jailer or a guard of a county jail, or a reserve law enforcement officer under the provisions of this Act.

(s) Establish procedures for the issuance of professional achievement or proficiency certificates based upon law enforcement training, education, and experience.

Sec. 2. Section 2B, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), is amended[18] to read as follows:

Sec. 2B. (a) The Commission shall establish such reporting standards and procedures for matters of appointment and termination of peace officers, jailers or guards of county jails, and reserve law enforcement officers by law enforcement agencies, for matters concerning the activities of certified training academies, and for other matters it deems necessary for the administration of this Act.

(b) The Commission shall furnish each agency and certified training academy with the required reporting forms.

(c) The chief administrative officer of a law enforcement agency or certified training academy shall be responsible for compliance with the reporting standards and procedures prescribed by the Commission.

(d) The Commission shall maintain the records submitted evidencing the qualifications of persons as required by Sections 6, 7A and 7B of this Act. When the person has this evidence on file with the Commission and a temporary or permanent license has been issued, no additional documentation is required for a subsequent appointment as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer. However, if a six-month period elapses between appointments, the Commission shall require the submission of a current criminal history check and fingerprints.

Sec. 3. Section 6, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413 (29aa), Vernon's Texas Civil Statutes), is amended[19] to read as follows:

Sec. 6. (a) Peace officers already serving under permanent appointment prior to Sepetmber 1, 1970, shall not be required to meet any requirement of Subsection (b) of this section as a condition of tenure or continued employment, nor shall failure of any such officer to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible. The Legislature finds, and it is hereby declared to be the policy of this Act, that such peace officers have satisfied such requirements by their experience.

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18. Vernon's Ann. Civ. St. art. 4413(29aa), § 2B.

(b) A person who has not satisfactorily completed preparatory training in law enforcement at a school that is operated by or approved by the Commission is eligible to be appointed as a peace officer or reserve law enforcement officer only on a probationary basis. A probationary peace officer or a probationary reserve law enforcement officer who fails to complete the required training within the probationary period must be removed from office and may not be reappointed on a probationary basis unless 12 months have passed since the date of removal from office and the Commission approves reappointment. The probationary period expires 12 months after the date of the original appointment except that:

(1) if a probationary peace officer or a probationary reserve law enforcement officer is enrolled in and attending approved law enforcement training at the end of the 12-month period, the probationary period is extended until the peace officer or reserve law enforcement officer completes or ceases to attend the training course; and

(2) if a probationary peace officer or a probationary law enforcement officer is employed in a regional planning commission area in which no approved course is offered during the 12-month period, the probationary period is extended until the date the first course in that area is offered and, if the peace officer or reserve law enforcement officer enrolls in and attends the course, until the date on which the peace officer or reserve law enforcement officer completes or ceases to attend the course.

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19. Vernon's Ann. Civ. St. art. 4413(29aa), § 6.

(c) No person who does not have a license issued by the Commission shall be appointed as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer. A person desiring a Commission license must file an application with the Commission in accordance with Commission rule.

(d) A person who appoints an individual possessing a license issued by the Commission as a peace officer, jailer or goard of a county jail, or reserve law enforcement officer shall notify the Commission of the appointment within 30 days of the date of appointment.

(e) A person who appoints or retains an individual as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer in violation of subsection (b), (c) or (d) of this section or in violation of Section 7A of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00).

(f) Nothing herein shall be construed to preclude an employing agency from establishing qualifications and standards for hiring or training peace officers, jailers or guards of county jails, or reserve law enforcement officers which exceed the minimum standards set by the Commission nor shall anything herein be construed to affect any sheriff, constable or other law enforcement officer elected under the provisions of the Constitution of the State of Texas.

(g) Any peace officer already serving under permanent appointment prior to September 1, 1970, and any sheriff, constable, or other law enforcement officer elected to

office under the provisions of the Constitution of the State of Texas, shall be eligible to attend peace officer training courses subject to the rules and regulations established by the Commission.

(h) "Peace officer," for the purposes of this Act, means only a person so designated by Article 2.12, Code of Criminal Procedure, 1965, and by Section 51.212, Texas Education Code.

(i) "Reserve law enforcement officer," for the purposes of this Act, means only a person so designated by Chapter 829, Acts of the 62nd Legislature, Regular Session, 1971 (Article 998a, Vernon's Texas Civil Statutes), and by Chapter 506, Acts of the 62nd Legislature, Regular Session, 1971 (Article 6869.1, Vernon's Texas Civil Statutes).

(j) "Jailer or guard of a county jail," for the purposes of this Act, means only a person so designated by Article 6871, Revised Civil Statutes of Texas, 1925.

(k) The Commission shall issue professional achievement or proficiency certificates based upon law enforcement training, education, and experience. For purposes of this subsection, the Commission shall use the employment records of the employing agency.

Sec. 4. Section 6A, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), is amended[20] to read as follows:

Sec. 6A. The Commission may revoke a license issued to a peace officer, a jailer or guard of a county jail, or a reserve law enforcement officer under the provisions of this Act if the Commission determines that the holder

of the license has violated a rule, regulation, requirement, specification, or other standard established by the Commission. The Commission shall revoke a license issued to a peace officer, a jailer or guard of a county jail, or a reserve law enforcement officer under the provisions of this Act if the holder of the license is convicted in any state or federal court of a felony.

Sec. 5. Section 7(a), Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), is amended[21] to read as follows:

(a) The Commission shall establish and maintain peace officer and reserve law enforcement officer training programs and training programs in the operation of county jails to be conducted by its own staff or through such agencies and institutions as the Commission may deem appropriate.

Sec. 6. Section 7A, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965 as added by Section 1, chapter 546, Acts of the 66th Legislature, 1979 (Article 4413 (29aa), Vernon's Texas Civil Statutes), is amended[22] to read as follows:

Sec. 7A. (a) A person may not be licensed by the Commission to be a peace officer, jailer or guard of a county jail, or reserve law enforcement officer unless, before licensing, the person is examined by a licensed psychologist or a licensed physician and is declared in writing by the psychologist or physician to be in satisfactory psychological and emotional health to be a peace

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20. Vernon's Ann. Civ. St. art. 4413(29aa), § 6A.

21. Vernon's Ann. Civ. St. art. 4413(29aa), § 7(a).

officer, jailer or guard of a county jail, or reserve law enforcement officer. The psychologist's or physician's declaration is not public information.

(b) The examining psychologist or physician shall be selected by the agency hiring a person desiring to be licensed as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer.

(c) The agency hiring a person desiring to be licensed as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer shall forward a copy of the psychologist's or physician's declaration to the Commission with the person's application for Commission licensing. The Commission shall keep the copy on file.

Sec. 7. Section 7A, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as added by Section 4, Chapter 599, Acts of the 66th Legislature, 1979 (Article 4413(29aa), Vernon's Texas Civil Statutes), is amended[23] to read as follows:

Sec. 7B. (a) A jailer or a guard of a county jail serving under permanent appointment before September 1, 1979, is not required to meet the requirements of Subsections (b) and (c) of this section as a condition of continued employment, nor does the failure of a jailer or guard to fulfill the requirements of this section make the person ineligible for a promotional examination for which the person is otherwise eligible. Those jailers and guards have satisfied the requirements of this section by their experience. Those jailers or guards are eligible to attend training courses in the operation of a county jail subject to the rules of the Commission. This subsection applies to a jailer or guard who was employed

22. Vernon's Ann. Civ. St. art. 4413(29aa), § 7A.

in a county jail before September 1, 1979, and whose employment was terminated before that date because of failure to satisfy educational standards adopted under Section 14, Chapter 480, Acts of the 64th Legislature, 1975 (Article 5115.1, Vernon's Texas Civil Statutes), except that:

(1) this subsection does not apply to an individual who attempted to satisfy those standards by taking an examination and because he or she committed a dishonest act regarding the examination, failed to pass or was not permitted to complete the examination; and

(2) this subsection does not apply to an individual if he or she attempted to prove compliance with those standards with a forged document.

(b) After September 1, 1979, a person may not be appointed as a jailer or guard of a county jail, except on a temporary or probationary basis, unless the person has satisfactorily completed a preparatory program of training in the operation of a county jail at a school approved or operated by the Commission. A jailer or guard of a county jail who has received a temporary or probationary appointment on or after September 1, 1979, and who fails to satisfactorily complete a basic course in the operation of a county jail, as prescribed by the Commission, within a one-year period from the date of his original appointment, forfeits his position and shall be removed from the position. The temporary or probationary employment may not be extended beyond one year by renewal of appointment or otherwise, except that after the lapse of one year from the date of the person's forfeiture and removal, the sheriff may petition

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23. Vernon's Ann. Civ. St. art. 4413(29aa), § 7B.

the Commission for reinstatement of the person to temporary or probationary employment.

Sec. 8. Section 8A, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), is amended[24] to read as follows:

Sec. 8A. (a) No person who has been convicted of a felony under the laws of this state, another state, or the United States may be licensed by the Commission as qualified to be a peace officer, a jailer or guard at a county jail, or reserve law enforcement officer.

(b) Final conviction of a felony under the laws of this state, another state, or the United States disqualifies a person previously licensed by the Commission to be a peace officer, jailer or guard at a county jail, or reserve law enforcement officer, and the Commission shall immediately revoke the license of a person so convicted.

(c) Subsection (a) of this section does not apply to a person if the person has been placed on probation pursuant to the deferred adjudication provision of Subsection (a), Section 3d, Code of Criminal Procedure, 1965.

Sec. 9[25] All certificates issued by the Commission on Law Enforcement Officer Standards and Education before the effective date of this Act that are valid on the effective date of this Act shall be treated as if they were licenses issued under Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), as amended by this Act.

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24. Vernon's Ann. Civ. St. art. 4413(29aa), § 8A.

Sec. 10. Section 2A, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), is repealed.[26]

Sec. 11. This Act takes effect September 1, 1981.

Sec. 12. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on May 19, 1981, by a non-record vote; passed by the Senate on May 31, 1981:

Yeas 31, Nays 0.

Approved June 16, 1981.

Effective Sept. 1, 1981.

COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION—CONTINUATION, MEMBERSHIP, POWERS, AND DUTIES

CHAPTER 479

S. B. No. 155

AN ACT

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25. Vernon's Ann. Civ. St. art. 4413(29aa) note.

26. Vernon's Ann. Civ. St. art. 4413(29aa), § 2A, repealed.

relating to the continuation of the Commission on Law Enforcement Officer Standards and Education, its membership, functions, powers and duties, and operations and to the powers and duties of the executive director of the commission; to grounds for removal of members; and to training, licensing, and disciplining of peace officers, jailers or guards of county jails, and reserve law enforcement officers; amending Sections 1a, 2, 3, 4, 6, 6A, 7B, 9A, and Subsections (b) and (c), Section 8A, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), and adding Sections 2A and 6B and Subsection (e), Section 2B.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413 (29aa), Vernon's Texas Civil Statutes), is amended by amending[74] Sections 1a, 2, 3, 4, 6, 6A, 7B, and 9A and by adding[75] Sections 2A and 6B to read as follows:

"Section 1a. The Commission on Law Enforcement Officer Standards and Education is subject to the Texas Sunset Act, *as amended (Article 5429k, Vernon's Texas Civil Statutes)*; and unless continued in existence as provided by that Act the commission is abolished, and this Act expires effective September 1, *1995*. . . .

"Section 2. *(a)* The Commission shall have the authority and power to:

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74. Vernon's Ann. Civ. St. art. 4413(29aa), §§ 1a, 2, 3, 4, 6, 6A, 7B, 9A.

75. Vernon's Ann. Civ. St. art. 4413(29aa), §§ 2A, 6B.

"*(1)* . . . Promulgate rules and regulations for the administration of this Act including the authority to require the submission of reports and information by any state, county, or municipal agency within this state which employs peace officers, jailers or guards of county jails, or reserve law enforcement officers.

"*(2)* . . . Establish minimum standards that relate to competence and reliability, including educational, training, physical, mental and moral standards for licensing as a peace officer, jailer or guard of a county jail, or reserve law enforcement officers; *(A)* . . . in permanent positions, and *(B)* . . . in temporary or probationary status.

"*(3)* . . . Issue temporary or permanent licenses to persons qualified under the provisions of this Act to be peace officers, jailers or guards of county jails, or reserve law enforcement officers.

"*(4)* . . . Certify persons as having qualified as instructors under such conditions as the Commission may prescribe.

"*(5)* . . . Establish minimum curriculum requirements for preparatory, in-service and advanced courses and programs for schools or academies operated by or for the state or any political subdivisions thereof for the specific purpose of training peace officers, jailers and guards of county jails, or reserve law enforcement officers, or recruits for those positions.

"*(6)* . . . Consult and cooperate with counties, municipalities, agencies of this state, other governmental agencies, and with universities, colleges, junior colleges,

and other institutions concerning the development of training schools and programs of courses of instruction for peace officers, jailers or guards of county jails, or reserve law enforcement officers.

"*(7)* . . . Approve, or revoke the approval of, institutions and facilities for schools operated by or for the state or any political subdivision thereof for the specific purpose of training peace officers, jailers and guards of county jails, reserve law enforcement officers, or recruits for those positions, and issue certificates of approval to such institutions and revoke such certificates of approval.

"*(8)* . . . Operate schools and facilities thereof and conduct courses therein, both preparatory, in-service, basic and advanced courses, for peace officers, jailers or guards of county jails, or reserve law enforcement officers, and recruits for those positions as the Commission may determine.

"*(9)* . . . Contract with other agencies, public or private, or persons, as the Commission deems necessary for the rendition and affording of such services, facilities, studies and reports as it may require to cooperate with municipal, county, state and federal law enforcement agencies in training programs, and to otherwise perform its functions.

"*(10)* . . . Make or encourage studies of any aspect of law enforcement, including police administration.

"*(11)* . . . Conduct and stimulate research by public and private agencies which shall be designed to improve law enforcement and police administration.

Additions in text indicated by italics; deletions by ". . ."

"*(12)* . . . Employ an Executive Director and such other personnel as may be necessary in the performance of its functions.

"*(13)* . . . Visit and inspect all institutions and facilities conducting courses for the training of peace officers, jailers or guards of county jails, or reserve law enforcement officers, and recruits for those positions, and make evaluations as may be necessary to determine if they are complying with the provisions of this Act and the Commission's rules and regulations.

"*(14)* . . . Adopt and amend rules and regulations, consistent with law, for its internal management and control.

"*(15)* . . . Accept any donation, contributions, grants or gifts from private individuals or foundations or the federal government.

"*(16)* . . . Report . . . to the Governor and to the Legislature . . . on its activities, with recommendations relating to any matter within its purview, and make such other reports as it deems desirable.

(17) In addition to meeting in the manner required by Subsection (b) of this section, meet . . . at such times and places in the State of Texas as it deems proper; meetings shall be called by the Chairman upon his own motion, or upon the written request of five members.

"*(18)* . . . Establish procedures for the revocation of licenses issued to a peace officer, a jailer or a guard of a county jail, or a reserve law enforcement officer under the provisions of this Act.

Additions in text indicated by italics; deletions by ". . ."

"*(19)* . . . Establish procedures for the issuance of professional achievement or proficiency certificates based upon law enforcement training, education, and experience.

"*(20) Establish reasonable and necessary fees for the administration of this Act.*

"*(b) The Commission shall meet not less than one time during each biennium to receive public comment on training and standards for peace officers, jailers or guards of county jails, and reserve law enforcement officers. Within a reasonable time after the meeting, the Commission shall report to the Governor and the Legislature findings and recommendations resulting from the meeting.*

"*(c) The Commission is subject to the open meetings law, Chapter 271, Acts of the 60th Legislature, Regular Session, 1967, as amended (Article 6252-17, Vernon's Texas Civil Statutes), and the Administrative Procedure and Texas Register Act, as amended (Article 6252-13a, Vernon's Texas Civil Statutes).*

"*(d) During January of each year, the Commission shall file with the Governor and the presiding officer of each house of the Legislature a complete and detailed written report accounting for all funds received and disbursed by the Commission during the preceding year.*

"*(e) The State Auditor shall audit the financial transactions of the Commission during each fiscal year.*

"*(f) The Executive Director of the Commission or his designee shall develop an intraagency career ladder pro-*

gram, one part of which shall be the intraagency posting of all nonentry level positions for at least 10 days before any public posting.

"(g) The Executive Director of the Commission or his designee shall develop a system of annual performance evaluations based on measurable job tasks. All merit pay for Commission employees must be based on the system established under this section.

"(h) The Commission may recognize, prepare, or administer continuing education programs for peace officers, jailers or guards of county jails, and reserve law enforcement officers. Participation in the programs is voluntary.

"(i) The Commission may require a state, county, or municipal agency that employs peace officers to provide each officer with a Commission-approved training course during a 24-month period. The course may not exceed 40 hours in length.

"(j) The Executive Director shall prepare and maintain a written plan to assure implementation of a program of equal employment opportunity whereby all personnel transactions are made without regard to race, color, disability, sex, religion, age, or national origin. The plans shall include:

"(1) a comprehensive analysis of all the agency's work force by race, sex, ethnic origin, class of position, and salary or wage;

"(2) plans for recruitment, evaluation, selection, appointment, training, promotion, and other personnel policies;

"(3) steps reasonably designed to overcome any identified underutilization of minorities and women in the agency's workforce; and

"(4) objectives and goals, timetables for the achievement of the objectives and goals and assignments of responsibility for their achievement.

"The plans shall be filed with the Governor's office within 60 days of the effective date of this Act, cover an annual period, and be updated at least annually. Progress reports shall be submitted to the Governor's office within 30 days of November 1 and April 1 of each year and shall include the steps the agency has taken within the reporting period to comply with these requirements.

Section 3. *(a)* The Commission *is* . . . composed of nine members, residents of the State of Texas, and appointed by the Governor with the advice and consent of the Senate.

"(b) Three members must be either a sheriff, a constable, or a chief of police. Two members must be licensed peace officers who at the time of their appointments hold nonsupervisory positions with a law enforcement agency. One member must be a person who is licensed under the provisions of this Act. Each licensed member must have been licensed for the five consecutive years preceding his appointment. Three members must be members of the general public. A person is not eligible for appointment as a public member if the person or the person's spouse:

"(1) is licensed by an occupational regulatory agency in the field of law enforcement;

"(2) is employed by or participates in the management of a business entity or other organization related to the field of law enforcement; or

"(3) has, other than as a consumer, a financial interest in a business entity related to the field of law enforcement.

. . .

"(c) The Commissioner of Higher Education of the Coordinating Board, Texas College and University System, *the* Commissioner of the Texas Education Agency, the Director of the Texas Department of Public Safety, *the Executive Director of the Criminal Justice Division of the Governor's Office,* and the Attorney General shall serve as ex officio members of the Commission.

"(*d*) In the event a public officer shall be appointed, service by such officer or officers shall be an additional duty of the office. Such appointive members shall be appointed for a term of six years, provided, however, that of the members first appointed, three shall be appointed for a term of two years, three for a term of four years, and three for a term of six years. Any member chosen by the Governor to fill a vacancy created otherwise than by expiration of term shall be appointed for the unexpired term of the member he is chosen to succeed. Such appointment for unexpired term shall be with the advice and consent of the Senate.

"(e) A member or employee of the Commission may not be an officer, employee, or paid consultant of a trade association in the law enforcement industry. For the purposes of this section, 'trade associations in the law enforcement industry' does not include associations whose

purpose and membership is solely for the benefit of law enforcement officers themselves.

"(f) A person who is required to register as a lobbyist under Chapter 422, Acts of the 63rd Legislature, Regular Session, 1973, as amended (Article 6252-9c, Vernon's Texas Civil Statutes), by virtue of his activities for compensation in or on behalf of a profession related to the operation of the Commission may not serve as a member of the Commission or act as the general counsel to the Commission.

"(g) Appointments to the Commission shall be made without regard to the race, creed, sex, religion, or national origin of the appointees.

"(h) It is a ground for removal from the Commission that a member:

"(1) does not have at the time of appointment the qualifications required by Subsection (b) of this section for appointment to the Commission;

"(2) does not maintain during the service on the board the qualifications required by Subsection (b) of this section for appointment to the board; or

"(3) violates a prohibition established by Subsection (e) or (f) of this section.

"(i) The validity of an action of the Commission is not affected by the fact that it was taken when a ground for removal of a member of the Commission existed.

"Section 4. The Commission shall elect a chairman, vice-chairman, and secretary from among the appointed

members . . . at its first meeting succeeding new appointments to fill regular terms. Five members, *excluding ex officio members,* shall constitute a quorum. *An ex officio member of the Commission may not vote in an election of officers of the Commission or on any matter before the Commission. . . .*"

"*Section 6. (a) A peace officer serving under a permanent appointment prior to September 1, 1970, is not required to meet a requirement under Subsection (b) of this section as a condition of tenure, continued employment, or promotion unless the officer seeks a new appointment on or after September 1, 1984 . . .*

"*(b) Except as provided by Subsection (a) of this section, a . . .* person who has not satisfactorily completed preparatory training in law enforcement at a school that is operated by or approved by the Commission is eligible to be appointed as a peace officer or reserve law enforcement officer only on a probationary basis. A probationary peace officer or a probationary reserve law enforcement officer who fails to complete the required training within the probationary period must be removed from office and may not be reappointed on a probationary basis. . . . The probationary period expires 12 months after the date of the original appointment except that:

"(1) if a probationary peace officer or a probationary reserve law enforcement officer is enrolled in and attending approved law enforcement training at the end of the 12-month period, the probationary period is extended until the peace officer or reserve law enforcement officer completes or ceases to attend the training course; and

"(2) If a probationary peace officer or a probationary law enforcement officer is employed in a regional planning commission area in which no approved course is offered during the 12-month period, the probationary period is extended until the date the first course in that area is offered and, if the peace officer or reserve law enforcement officer enrolls in and attends the course, until the date on which the peace officer or reserve law enforcement officer completes or ceases to attend the course.

"(c) No person who does not have a license issued by the Commission shall be appointed as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer. A law enforcement agency hiring a person desiring a Commission license must file an application with the Commission in accordance with Commission rule.

"(d) A person who appoints an individual possessing a license issued by the Commission as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer shall notify the Commission of the appointment within 30 days of the date of appointment.

"(e) A person who appoints or retains an individual as a peace officer, jailer or guard of a county jail, or reserve law enforcement officer in violation of Subsection (b), (c), or (d) of this section or in violation of Section 7A of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00).

"(f) Nothing herein shall be construed to preclude an employing agency from establishing qualifications and standards for hiring or training peace officers, jailers

or guards of county jails, or reserve law enforcement officers which exceed the minimum standards set by the Commission nor shall anything herein be construed to affect any sheriff, constable or other law enforcement officer elected under the provisions of the Constitution of the State of Texas.

"(g) Any peace officer already serving under permanent appointment prior to September 1, 1970, and any sheriff, constable, or other law enforcement officer elected to office under the provisions of the Constitution of the State of Texas, shall be eligible to attend peace officer training courses subject to the rules and regulations established by the Commission.

"(h) 'Peace officer,' for the purposes of this Act, means only a person so designated by Article 2.12, Code of Criminal Procedure, 1965, or by Section 51.212 or 51.214, Texas Education Code.

"(i) The Commission shall not adopt or enforce rules or regulations that set the date of employment or appointment of a peace officer at a later date than appears on employment records of the hiring law enforcement agency. The provisions of this subsection shall be retroactive.

"(j) The Commission shall maintain records submitted in accordance with Sections 6(c) and 7A(c) of this Act as evidence of qualifications for employment of peace officers or of jailers or guards of a county jail, including records that relate to age, education, physical standards, citizenship, good moral character, experience, and other matters relating to competence and reliability, and the Commission shall maintain records of a psy-

chologist's or physician's declaration of psychological and emotional health of a peace officer or of a jailer or guard of a county jail. If the Commission has on record evidence of fulfillment of employment or appointment qualifications of a peace officer or of a jailer or guard of a county jail, the peace officer, jailer, or guard may not be required to submit duplicate records of qualifications if the peace officer, jailer, or guard is employed or appointed by another law enforcement agency as a peace officer or a jailer or guard of a county jail.

"(k) After submitting the proper application, a peace officer, *reserve law enforcement officer,* or a jailer or guard of a county jail who has completed the required training, *received a passing grade on the examination required by Section 6B of this Act, is declared to be in satisfactory psychological and emotional health as required by Section 7A of this Act, has demonstrated weapons proficiency if required to by Section 7(c) of this Act,* and *has* acquired the necessary experience for certification shall be certified by the Commission. A certified peace officer, *a certified reserve law enforcement officer,* or a certified jailer or guard of a county jail may be employed or appointed by a law enforcement agency and the law enforcement agency shall report the employment or appointment to the Commission within 30 days after the date of employment or appointment. If there is a break in employment of a peace officer, *reserve law enforcement officer,* or of a jailer or guard of a county jail for a period of 180 days or more, the appointing law enforcement agency shall also include with its report a

new criminal history record check, a new declaration of psychological and emotional health, and two completed fingerprint cards.

"(*l*) . . . 'Reserve law enforcement officer,' for the purposes of this Act, means only a person so designated by Chapter 829, Acts of the 62nd Legislature, Regular Session, 1971 (Art. 998a) Vernon's Texas Civil Statutes), and by Chapter 506, Acts of the 62nd Legislature, Regular Session, 1971 (Article 6869.1, Vernon's Texas Civil Statutes).

"(*m*) . . . 'Jailer or guard of a county jail,' for the purposes of this Act, means only a person so designated by Article 6871, Revised Civil Statutes of Texas, 1925.

"(*n*) . . . The Commission shall issue professional achievment or proficiency certificates based upon law enforcement training, education, and experience. For purposes of this subsection, the Commission shall use the employment records of the employing agency.

"(o) Except in an emergency, the combined hours that a licensed peace officer is required to work at his employing agency and attend a Commission-approved basic preparatory school may not exceed 40 hours in a week.

"Section 6A. *(a) The Commission shall revoke or suspend a license, place on probation a person whose license has been suspended, or reprimand a licensee for a violation of this Act or a rule of the Commission.*

"(b) The Commission shall keep an information file about such complaint filed with the Commission relating to a licensee.

Additions in text indicated by italics; deletions by ". . ."

"(c) If a written complaint is filed with the Commission relating to a licensee, the Commission, at least as frequently as quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

"(d) If the Commission proposes to suspend or revoke a person's license, the person is entitled to a hearing before the board.

"(e) Proceedings for the suspension or revocation of a license are governed by the Administrative Procedure and Texas Register Act, as amended (Article 6252-13a, Vernon's Texas Civil Statutes). . . ."

"Section 7B. (a) A jailer or a guard of a county jail serving under permanent appointment before September 1, 1979, is . . . eligible to attend training courses in the operation of a county jail subject to the rules of the Commission. . . .

"(b) A jailer or guard of a county jail serving under permanent appointment before September 1, 1979, whether or not that person's employment was terminated before that date because of failure to satisfy standards adopted under Section 14, Chapter 480, Acts of the 64th Legislature, 1975, as amended (Article 5115.1, Vernon's Texas Civil Statutes), is not required to meet a requirement imposed by Subsection (c) of this section as a condition of continued employment or promotion unless:

"(1) in an attempt to meet those standards the person took an examination and failed or was not allowed to

finish the examination because of making a dishonest act in regard to the examination;

"(2) the person forged a document purporting to show that he met the standards; or

"(3) the person seeks a new appointment as a jailer or guard on or after September 1, 1984.

"(*c*) . . . After September 1, 1979, a person may not be appointed as a jailer or guard of a county jail, except on a temporary or probationary basis, unless the person has satisfactorily completed a preparatory program of training in the operation of a county jail at a school approved or operated by the Commission. A jailer or guard of a county jail who has received a temporary or probationary appointment on or after September 1, 1979, and who fails to satisfactorily complete a basic course in the operation of a county jail, as prescribed by the Commission, within a one-year period from the date of his original appointment, forfeits his position and shall be removed from the position. The temporary or probationary employment may not be extended beyond one year by renewal of appointment or otherwise, except that after the lapse of one year from the date of the person's forfeiture and removal, the sheriff may petition the Commission for reinstatement of the person to temporary or probationary employment."

"Section 9A. Any person dissatisfied with the action of the Commission may appeal the action of the Commission by filing a petition within thirty (30) days thereafter in *a* . . . district court . . . of Travis County, Texas, and the court is vested with jurisdiction, and it shall

Additions in text indicated by italics; deletions by ". . ."

be the duty of the court, to set the matter for hearing upon ten (10) days written notice to the Commission and the attorney representing the Commission. The court in which the petition of appeal is filed shall determine whether any action of the Commission shall be suspended pending hearing, and enter its order accordingly, which shall be operative when served upon the Commission, and the Commission shall provide the attorney representing the Commission with a copy of the petition and order. The Commission shall be represented in such appeals by the district or county attorney of the county, or the Attorney General, or any of their assistants."

"Section 2A. The Commission may not approve a training school, program, or course of instruction for peace officers, jailers or guards of a county jail, or reserve law enforcement officers unless the institution that offers the school, program, or course has created an advisory board for the purpose of developing a curriculum. Not less than one-third of the members of the board must be members of the general public. For the purposes of this section, a person is a member of the general public if the person is qualified under Section 3 of this Act to serve as a public member on the commission."

"Section 6B. (a) The Commission shall conduct an examination of applicants for a license required by this Act at least four times each year at times and places designated by the Commission.

"(b) The Commission shall prescribe the content of an examination for a peace officer's license, for a reserve law enforcement officer's license, and for a jailer's or

guard's license and shall include in each examination a written examination that tests the knowledge of the applicant about the occupation for which he is seeking a license.

"(c) The Commission shall determine the standards for acceptable performance on the examination.

"(d) Not later than the 30th day after the day on which a licensing examination is administered under this Act, the Commission shall notify each examinee of the results of the examination. However, if an examination is graded or reviewed by a national testing service, the Commission shall notify examinees of the results of the examination not later than the 14th day after the day on which the Commission receives the results from the testing service. If the notice of the examination results will be delayed for longer than 90 days after the examination date, the Commission shall notify the examinee of the reason for the delay before the 90th day.

"(e) If requested in writing by a person who fails the licensing examination administered under this Act, the Commission shall furnish the person with an analysis of the person's performance on the examination."

SECTION 2. Section 2B, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), is amended by adding[76] Subsection (e) to read as follows:

"(e) The Commission shall prepare information of public interest describing the regulatory functions of the Commission and describing the Commission's procedures by whch public complaints are filed with and resolved by

the Commission. The Commission shall make the information available to the general public and appropriate state agencies."

SECTION 3. Subsection (b) and (c), Section 8A, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965 (Article 4413(29aa), Vernon's Texas Civil Statutes), are amended[77] to read as follows:

"(b) *Conviction* . . . of a felony under the laws of this state, another state, or the United States disqualifies a person previously licensed by the Commission to be a peace officer, jailer or guard at a county jail, or reserve law enforcement officer, and the Commission shall immediately revoke the license of a person so convicted.

(c) *For the purposes of this section, a person is convicted of a felony when an adjudication of guilt on a felony offense is entered against the person by a court of competent jurisdiction, whether or not:*

"(1) the sentence is subsequently probated and the person is discharged from probation;

"(2) the accusation, complaint, information, or indictment against the person is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

"(3) the person is pardoned for the offense, unless the pardon is expressly granted for subsequent proof of innocence. . . ."

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76. Vernon's Ann. Civ. St. art. 4413(29aa), § 2B, subsec. (e).

77. Vernon's Ann. Civ. St. art. 4413(29aa), § 8A, subsecs. (b), (c).

Additions in text indicated by italics; deletions by ". . ."

SECTION 4.[78] (a) The requirements under Section 2, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), as amended by this Act, that the director develop an intraagency career ladder program and a system of annual performance evaluations shall be implemented before September 1, 1984. The requirement of Subsection (g) of Section 2 that merit pay be based on the performance evaluation system shall be implemented before September 1, 1985.

(b) As incumbent members of the commission vacate their offices or as their terms expire, the governor shall appoint members to the commission to achieve as soon as possible the membership scheme established by Section 3, Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes), as amended by this Act.

SECTION 5. This Act takes effect September 1, 1983.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

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78. Vernon's Ann. Civ. St. art. 4413(29aa) note.

Additions in text indicated by italics; deletions by ". . ."

Passed the Senate on February 17, 1983, by a viva-voce vote; Senate concurred in House amendments on May 26, 1983, by a viva-voce vote; passed the House, with amendments, on May 24, 1983, by a non-record vote.

Approved June 19, 1983.

Effective Sept. 1, 1983.